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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-196

BENJAMIN A. JAVITS,

Petitioner,

v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

PETITIONER'S REPLY BRIEF

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In its brief in opposition to the Petition for Certiorari, Respondent displays a lack of sensitivity to the rights of procedural due process which Petitioner, as well as all other attorneys similarly situated, are entitled. Respondent, in so doing, overlooks controlling decisions of this Court, and for this reason alone certiorari should be granted. Thus, in Point I, Respondent argues that: "A disciplinary proceeding is not a criminal case within the meaning of the Constitution." In so arguing, Respondent cites an 1882 case not in point (*Ex Parte Wall*, 107 U. S.

265 [1882]) and overlooks all of the cases cited by Petitioner (*Matter of Ruffalo,* 390 U. S. 544 [1968]; *Spevack* v. *Klein,* 385 U. S. 511 [1967]; *Law Students Research Council, Inc.* v. *Wadmond,* 401 U. S. 154 [1971]; *Erdmann* v. *Stevens,* 458 F. 2d 1205, 1209 2d Cir. [1972]), which hold that the constitutional safeguards to which attorneys are entitled in disciplinary proceedings, are analogous to the protections afforded defendants in a criminal case.

In Point II of its brief, Respondent's effort to distinguish *Matter of Ruffalo, supra,* is so frivolous that it amounts to an admission that the state Courts simply ignored the holding of this Court in *Ruffalo.* Thus, Respondent attempts to distinguish *Ruffalo* (page 15) on the basis that "no charges were added in this proceeding predicated upon Petitioner's testimony." In other words, the Bar Association apparently contends that *Ruffalo* permits State Courts to convict an attorney based upon charges to which he was given no notice and opportunity to be heard so long as the new charges were not based upon the testimony of the accused.

The holding of *Ruffalo* is that attorneys in disciplinary proceedings are entitled to notice and an opportunity to be heard in accordance with basic principles of due process. The fact that the Bar Association is not willing to concede this elementary principle and displays such a lack of understanding of the protection it is designed to afford is alone reason for granting certiorari. The Bar Association is apparently not willing to concede that the potential destruction of a man's livelihood and reputation are serious enough to warrant constitutional protection for the accused. It is submitted that this Court should grant certiorari and make it clear that its decision in *Matter of Ruffalo* cannot be ignored by the State

Courts, and that the lives and reputations of attorneys cannot be destroyed without adhering to the principles of procedural due process.

The position of the Bar Association is amply illustrated by the following statement on page 18 of its brief:

> "The argument has been made by petitioner's counsel that the Court, in the above-quoted language, found the petitioner guilty of misconduct not charged in the petition. The fact that the Court cited four Canons which were not contained in the charge letter is of no consequence since the Court sustained the charges of professional misconduct recited in both the charge letter and the petition."

Respondent's lack of awareness of Petitioner's constitutional rights is manifested by the fact that it is willing to treat the above "four Canons" as simply excess charges added by the Court. Respondent, while admitting that no notice was given to Petitioner, fails to consider that Petitioner had no opportunity to prepare a defense to charges that he had violated the above Canons and that the Appellate Division obviously considered the violation of these Canons in imposing punishment. Moreover, no Appellate Court ever reviewed Petitioner's claim that he was found guilty of charges of which he had no notice.

In Point II of the Petition for Certiorari, Petitioner argues that he was not given an independent judicial forum to consider his argument that the Appellate Division violated his constitutional rights. In disputing this point, Respondent overlooks all of the cases and statutes cited by Petitioner and argues that all prior orders of the New York Courts constituted decisions on the merits, rejecting Petitioner's constitutional claims. Suffice it to point out that all prior orders of the New York Courts did not

reach the merits but instead held that Petitioner was not entitled to a hearing on his constitutional claims. The effect of these orders is, of course, that Petitioner has never had independent judicial consideration of his constitutional arguments.

The prior orders of the New York Courts are analogous to this Court's denial of a petition for certiorari. For example, if the Federal Appeals Court, acting as the Court of first instance, convicted a person on the basis of new charges, this Court would certainly not consider its discretionary certiorari jurisdiction as a complete, independent review of the alleged constitutional violations.

Respondent's argument in Point IV of its brief, that Petitioner's equal protection argument was not raised below, is not true and is contradicted by the record. The argument was raised on pages 13 and 14 of Petitioner's brief before the New York Court of Appeals on his motion for reargument of the denial by the Court of Appeals of his motion for leave to appeal. For the convenience of the Court, the argument as raised below is annexed hereto as Exhibit 1.

Finally, Respondent's selective statement of facts is obviously designed to camouflage the issues and to attempt to influence this Court into denying certiorari on the basis that even if constitutional rights were violated, Petitioner was guilty in any event.

Petitioner emphatically denies that he had any knowledge of any improprieties; if they, in fact, occurred. It should be noted that in the entire self-serving recitation of facts, the Bar Association can demonstrate nothing in the record to show that it proved the element of scienter. On page 5 of its brief, Respondent draws an inference that knowledge existed by suggesting that the $10,000 payment was made by bank check instead of regular check

so that no cancelled check would be available as a means of tracing. However, Respondent neglects to state that the record of the payment was readily available in Petitioner's books and records and denominated as payment to Mexican counsel. Clearly, if there was any effort made to conceal this payment, a record would not have been so readily available in Petitioner's books and records. The fact is that there is simply no evidence that Petitioner had knowledge of any wrongdoing.

Finally, it must be reiterated that Petitioner was given no independent forum to review his above argument that no scienter existed for the conviction of the above charge. As stated in Point III of the Petition for Certiorari, any other member of Petitioner's class in New York State would have been entitled to independent consideration of this issue. It is respectfully submitted that this, in and of itself, amounts to a denial to Petitioner of equal protection of the laws and, in any event, presents a novel and important issue which this Court should review by granting the writ.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Writ of Certiorari be granted.

Respectfully submitted,

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EXHIBIT I

Petitioner's Equal Protection Argument as Raised Below

By way of illustration, in civil service proceedings involving *police, teachers,* etc., the employee being charged has an appeal as of right for enforcement of Constitutional guarantees. See *Murray* v. *Murphy, supra; Shapiro* v. *Board of Regents,* 16 N. Y. 2d 783 (1965). His procedure is to institute an Article 78 proceeding in the Appellate Division, which court reviews the procedure and findings of the departmental hearing and reviews the Constitutional issue of whether the departmental body found the employee guilty of charges without notice.

It is respectfully submitted that an attorney who is suspended from practicing law in the State by the Appellate Division stands in the same position as a public employee who is being suspended by his governmental employer. Both are being deprived of their livelihood and reputation and are thereby suffering the same punishment at the hands of the State. Governmental employees are provided with a procedure to assure protection of Constitutional safeguards; failure to provide attorneys with a similar procedure constitutes a flagrant violation of equal protection of the laws.